96-1599

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

JUDY ANN SHOWERS,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was Petitioner denied a fair trial as a result of the Respondent presenting evidence concerning the Petitioner's general reputation for truthfulness and honesty?

2. Did trial counsel for Petitioner represent her effectively and strategically through his cross examination of the Commonwealth's Psychiatrist?

LIST OF ALL PARTIES

The parties to this Brief in Opposition are: the Commonwealth of Pennsylvania, the Respondent herein, by and through its counsel of record, Tony Rosini, District Attorney of Northumberland County, Sunbury, Pennsylvania; Judy Ann Showers, Petitioner herein, by and through her counsel of record, William C. Costopoulos.

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ARGUMENT

1. Petitioner was not denied a fair trial as a result of the Respondent presenting evidence concerning the Petitioner's general reputation for truthfulness and honesty.

The Petitioner, Judy Showers, took the witness stand and testified in her own defense. She testified that she had lied to investigators. (R. 215a-216a) The Petitioner's inconsistent statements: the "truth" she told in September 1992 when she first spoke with Trooper McBride, the "truth" she told during subsequent statement, the "truth" she told in February 1993 when she admitted that she was the author of the suicide note, and the March 1994 testimony she gave on the witness stand all differed substantially in regard to an important matter of evidence. Thus, contrary to the defense's misapprehension of law, by taking the stand and testifying that she was telling the jury the truth, she placed her reputation for truthfulness, honesty and veracity at issue as does any witness who takes the witness stand.

The horn book analysis of Packel & Poulin clearly defines the issue addressed in this Argument. Note Packel & Poulin, *Pennsylvania Evidence* Section 404.2 CHARACTER OF THE ACCUSED, at page 141. In this section one of the factors apparently overlooked by the defense is that the Petitioner took the witness stand and subjected herself to the same type of cross-examination or rebuttal testimony that could be elicited against any witness. As such, "an accused who testifies may be impeached by evidence of bad character for truthfulness. In this regard, the accused is little different from any other witness."

Also see Packel & Poulin, *Pennsylvania Evidence* Section 608.1 CHARACTER EVIDENCE TO IMPEACH – REPUTATION AND OPINION, at page 419. "Every witness, even a criminal defendant, who testifies puts his or her character for truthfulness in issue. . . . In *Commonwealth v. Payne,* the Pennsylvania Supreme Court stated that a witness' truthfulness might be attached by direct contradiction or . . . by showing a bad reputation for truth and veracity in general. Thus, evidence of a witness' bad reputation for truth and veracity is always admissible.

Petitioner's argument does not comport with many rulings of Pennsylvania courts including *Commonwealth v. Fowler,* 434 Pa. Super. 148, 642 A.2d 517 (1994).

In Pennsylvania, a witness's truthfulness may be attacked by showing that he or she has a bad reputation for truth and veracity. *Commonwealth v. Payne,* 205 Pa. 101, 104, 54 A. 489, 491 (1903). "If a witness is impeached by proof of bad reputation for truth and veracity, evidence may then be admitted to prove good reputation for truth and veracity." *Commonwealth v. Smith,* 389 Pa. Super. 626, 630, 567 A.2d 1080, 1082 (1989). See: *Wertz v. May,* 21 Pa. 274, 279 (1853); McCormick, Evidence Vol. 1, Ch. 5, Sec. 47 (4th ed. 1992); Packel and Poulin, *Pennsylvania Evidence* Ch. VI, Sec. 608.1 (1987). Evidence in support of the general reputation of a witness for truth and veracity, however, is not competent until his or her general reputation has been assailed. "Every witness puts his [or her] character in issue; but until evidence tending directly to impeach it is produced, the law presumes it to be good, and therefore testimony to prove it good is superfluous." *Wertz v. May,* supra at 279. See also: *Commonwealth v.*

Smith, supra, Packel and Poulin, Pennsylvania Evidence, supra, Sec. 608.1 at 419; Henry, Pennsylvania Evidence Vol. 2, Ch. 18, Sec. 804, at 260 (1953). Also see *Commonwealth v. Harris*, 442 Pa. Super. 116, 658 A.2d 811, 812 (1995) citing *Commonwealth v. Butler*, 405 Pa. 36, 47, 173 A.2d 468 (1961) and *In Interest of M.M.*, 439 Pa. Super. 307, 653 A.2d 1271, 1276 (1995). Petitioner also raises the issue of relevancy of the reputation evidence in terms of time. All three character rebuttal witnesses were familiar with the Petitioner's reputation from their employment at Williamsport Hospital. Gloria Harbaugh had known the Petitioner for more than a year. She last knew about the Petitioner's reputation for truthfulness in 1989, not 1983 as indicated by Respondent in her petition at pp. 43-44. No reference is even made to the year 1983 in Harbaugh's testimony. In 1989 the Petitioner's reputation for honesty at Williamsport Hospital was bad, not good. This was within three (3) years of the crime and the Petitioner's first statements to police, within four (4) years of her incarceration and within five (5) years of the trial.

Harbaugh also testified that she had terminated Showers' employment and that was the reason Showers had left her employment at Williamsport Hospital. This was not rebuttal of the Petitioner's good character for being a law abiding citizen. It was direct impeachment pointing out a glaring inconsistency to statements previously given by the Petitioner to Trooper McBride and her testimony on direct examination during trial. (R. 252a-253a).

Diane Campbell knew the Petitioner from 1979 through the mid 1980's, a period of six (6) to seven (7)

years. During that period of time the Petitioner's reputation for honesty in the Williamsport Hospital community was not good. This was within six (6) to seven (7) years of the murder and the Petitioner's first statements, seven (7) to eight (8) years of her incarceration and eight (8) to nine (9) years of the trial. (R. 244a-247a). Michele Steinbacher knew Petitioner from 1981 through 1985. During those four years Michele noted that Petitioner's reputation for honesty was not good. In that community the Petitioner was not trusted. This was within seven (7) years of the murder and the Petitioner's first statements, eight (8) years of her incarceration and nine (9) years of the trial. (R. 249a-250a).

The witnesses' knowledge of the Petitioner's bad reputation for honesty is not considered in a vacuum. The combined knowledge of the three (3) witnesses spanned the Petitioner's bad reputation for honesty within the Petitioner's work community from 1979 up through 1989. The knowledge was conjunctive not disjunctive. Therefore, none of the information can be considered to be remote when the Petitioner's bad reputation for honesty spanned such a long period of time including the time relatively close to the murder, the Petitioner's incarceration and trial.

Based on the foregoing argument this Honorable Court need not grant review on this issue. It has been properly decided according to Pennsylvania law.

2. Trial counsel for Petitioner represented her effectively and strategically through his cross-examination of the Commonwealth's Psychiatrist.

The issue raised by the Petitioner is prematurely addressed. The Petitioner has failed to present any cogent information to this court for review as to the reasoning behind the decision made by trial counsel. The lack of a record from an evidentiary hearing results in the issue being raised in a vacuum. See *Commonwealth v. Jackson*, 401 Pa. Super. 258, 263-264, 585 A.2d 36, 38 (1991). In *Jackson* the court held as follows:

> In making allegations of ineffectiveness, an appellant must allege sufficient facts upon which a reviewing court can conclude that trial counsel may have been ineffective. As our Supreme Court has aptly stated,
>
> > Assertions of ineffectiveness in a vacuum cannot be ineffectiveness. Counsel who is alleging ineffectiveness must set forth an offer to prove at an appropriate hearing sufficient facts upon which a reviewing court can conclude that trial counsel may have, in fact, been ineffective. This Court will no longer consider claims of ineffective assistance of counsel in the abstract. Citing *Commonwealth v. Pettus*, 492 Pa. 558, 563, 424 A.2d 1332, 1335 (1981).
>
> Finally, we note that appellants cannot meet their burden in an ineffectiveness hearing with the bare assertion that the defense might have been handled differently, citing *Commonwealth v. McKenna*, 498 Pa. 416, 446 A.2d 1274 (1982).

Because Petitioner has failed to request an evidentiary hearing, Petitioner has waived the need for record of trial counsel's explanation of his trial strategy as to this allegation. Therefore, Petitioner has failed to do anything other than make a mere boilerplate allegation. Without

facts of record to support the asserted omission, Petitioner's argument is not permissible. *Commonwealth v. Heckman*, 366 Pa. Super. 224, 530 A.2d 1372, 1373 (1987).

Alternatively, the Pennsylvania Supreme Court recently delineated the standards for determining the effectiveness of counsel in *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771, 777 (1995), which is in parity with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The three prong test under which these claims are to be reviewed when presented on direct appeal is well settled, and was recently reiterated by the Pennsylvania Supreme Court in *Commonwealth v. Douglas*, 537 Pa. 588, 645 A.2d 226 (1994). First, a defendant must demonstrate that his claim is of arguable merit. In the event this threshold requirement is satisfied, a defendant must show that counsel had no reasonable basis for the act or omission in question. Finally, a defendant must establish that but for counsel's act or omission, the outcome of the proceedings would have been different. *Douglas*, 537 Pa. at 597, 645 A.2d at 230 (citing *Commonwealth v. Pierce*, 515 Pa. 153, 527 A. 2d 973 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . However, where a claim of ineffective assistance is advanced on collateral attack, the PCRA renders more stringent the prejudice requirement which must be satisfied before relief can be granted. Specifically, Section 9543 requires a defendant to prove that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S. Sec. 9543 (a)(2)(ii).

The standard for determining whether counsel had a reasonable basis for his or her actions is well established. As provided in *Pierce*:

> "Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that counsel's decisions had any reasonable basis." *Pierce*, 515 Pa. at 158, 527 A.2d at 975 (quoting *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 235 A.2d 349, 352-353 (1967).

Trial counsel's cross-examination is best described as an attempt to discredit a hired gun. This is a commonly used and accepted strategy for cross-examination of expert witnesses which had a clearly reasonable basis in considering the facts of this case.

Another reasonable basis for the limited cross-examination was that an extended cross-examination of the Commonwealth's expert would assuredly have further damaged the weak and baseless opinion rendered by the defense expert. The defense expert had no information other than the attenuated information regarding a five (5) to twelve (12) year old work related anxiety suffered by the victim who was enjoying retirement at the time of the murder. The basis of the victim's past problems had no

foundation in any other area of his life as testified to by Dr. Gilmore who treated him in 1986-1987.

This issue has no arguable merit and should not be the basis for review by this Honorable Court.

CONCLUSION

Wherefore, Respondent respectfully requests that Your Honorable Court deny the Petition for a Writ of Certiorari, thereby denying any subsequent relief.

Respectfully submitted,

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